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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDREW ROCCA SANTOS,

Defendant and Appellant.

B203177

(Los Angeles County
Super. Ct. No. MA037958)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Hayden Zacky. Affirmed in part and remanded in part with directions.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Andrew “Rocky” Santos was convicted by a jury of one count of battery on a school employee. (Pen. Code, § 243.6.)¹ The jury further found true the aggravating circumstance that the crime involved great violence or bodily harm. Santos appeals from the judgment on multiple grounds. We affirm with directions.

FACTS

I. Previous Disputes

Santos had been a security guard at Quartz Hill High School for over 16 years. His wife also worked as a security guard at the high school. Mark Bryant is the principal at the school. In November 2005, during the course of an altercation with an adult visitor, Santos’ wife was thrown over the visitor’s shoulder and suffered a cut near her eye. Bryant was present at the scene of the altercation. Santos’s wife was involuntarily transferred to another school shortly after she was injured. Santos believed that Bryant should have, but failed to help his wife, and played a role in that transfer.

During Bryant’s first year as principal, he ordered security to power wash the school. Santos filed an Occupation Safety and Health Act (OSHA) complaint pursuant because he felt they were not provided with sufficient protective equipment or training. The school changed its practices after the complaint was filed. Santos then filed a second complaint to the state labor department, stating he felt his vacation and sick leave requests were unfairly denied due to his initial OSHA complaint.

II. The Incident

For the most part, Bryant and Santos agree about what happened. In March 2007, Bryant directed all security personnel and administrators to pick up trash in the 25-minute period between lunches. Santos felt the order interfered with his duties and violated the terms of his employment. On March 12, 2007, the head of security told Bryant that Santos refused to pick up trash. Bryant directed the head of security to write up Santos for his refusal. Bryant believed it was proper to order security to pick up trash because he

¹ All further section references are to the Penal Code.

was given permission to issue the order by the assistant superintendent in charge of human resources at the school district.

Santos asked for a meeting with Bryant on March 13, 2007. Bryant testified that Santos looked agitated and aggressive when he entered Bryant's office. Santos presented Bryant with a job posting from January 2006 that stated security would not have any regularly assigned custodial duties. When Bryant told Santos he would check with human resources, but that the write-up would stand, Santos believed it was becoming personal. Bryant responded that he did not feel it was personal when everyone was required to do it. Santos then said, "I believe that it is . . . personal, and if you want to take it to the streets, we can do that." At this point, Santos's and Bryant's testimony diverge.

A. Prosecution's Version of Events

Bryant testified that Santos then hit Bryant with such force that he fell over in his chair and punched a hole in the wall. Santos hit Bryant more than 20 times while he was still seated with his back on the floor. When Bryant attempted to get up, Santos hit his head with his knee at least six times. Bryant then pushed Santos away with his legs and a vice-principal came in and told Santos to leave. Bryant's secretary testified she saw Santos punching Bryant through one of the windows but did not see how the fight started. Bryant testified he suffered quite a bit of soft tissue damage to his head and back. His eyes were also blackened. The jury was shown pictures of Bryant's injuries. After the incident, a complaint was filed by the security guards and their union about Bryant's order to pick up trash. It alleged the duty was outside their job description. Bryant was advised to stop the practice by the district's human resources superintendent.

B. Defense's Version of Events

Santos confirmed Bryant's testimony regarding the incident but testified that Bryant accepted his challenge and began to stand when Santos "felt a strike to my right shoulder, right bicep area, and [Santos] responded by punching him in the face." Bryant then fell over in his chair and Santos continued to punch him. Santos further testified that Bryant hit him while Bryant was still on the ground. Photographs of injuries to Santos's

knee, shin, and arm from the altercation were shown to the jury. Santos disengaged after a few more blows were exchanged.

The defense also called an investigator who testified he spoke with Linda Eversull, the health technician at the high school. Eversull was tending to Bryant's wounds when she reportedly overheard Bryant telling a vice principal that he accepted Santos's challenge stating, "Why outside? Why don't we do it right here?" Eversull also reported to the investigator that Bryant wanted to show everyone who was boss and frequently asked the staff to do things that were illegal or against school policy. When subpoenaed to testify at trial, she denied making these comments. The investigator testified she told him that she did not want to testify because "her husband is sick and that her job is on the line."

III. The Verdict and Sentencing

The jury convicted Santos as specified above. He was sentenced to 120 days in county jail and placed on formal probation for three years. Among the conditions of his probation, Santos was ordered to perform 45 days of community service with the California Department of Transportation, pay a \$200 restitution fine, complete a year of anger management counseling, and stay away from Quartz Hill High School, Bryant and his family as well as any known users or sellers of narcotics.

DISCUSSION

Santos appeals from the judgment on the following grounds: (1) the court lacked jurisdiction over the proceedings because the statute under which he was convicted did not apply in the context of an otherwise lawful labor dispute; (2) the conviction was not supported by sufficient evidence; (3) the trial court provided the jury with a self-defense instruction that was not a defense theory; (4) the trial court abused its discretion when it denied his motion for a new trial; and the (5) the narcotics related probation condition should be modified.

I. Jurisdiction

Santos was charged and convicted under section 243.6, which provides:

“When a battery is committed against a school employee engaged in the performance of his or her duties, or in retaliation for an act performed in the course of his or her duties, whether on or off campus, during the schoolday or at any other time, and the person committing the offense knows or reasonably should know that the victim is a school employee, the battery is punishable by imprisonment in a county jail not exceeding one year, or by a fine not exceeding two thousand dollars (\$2,000), or by both the fine and imprisonment. However, if an injury is inflicted on the victim, the battery shall be punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than two thousand dollars (\$2,000), or by imprisonment in the state prison for 16 months, or two or three years. [¶] For purposes of this section, ‘school employee’ has the same meaning as defined in subdivision (d) of Section 245.5. [¶] This section shall not apply to conduct arising during the course of an otherwise lawful labor dispute.”

Santos argues that the trial court lacked subject matter jurisdiction over the proceedings because the altercation arose “during [the course of] an otherwise lawful labor dispute.” “Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter [i.e., the offense] or the parties.” (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 288; *People v. Minahen* (1986) 179 Cal.App.3d 180, 186; *Burns v. Municipal Court* (1961) 195 Cal.App.2d 596, 599.)

In his reply, Santos clarifies his position: “Any criminal prosecution in state court needed to come under a Penal Code section other than Penal Code section 243.6.” He further states, “There are several other provisions in the Penal Code under which appellant could have been prosecuted, such as assault or simple battery.” By this statement, Santos concedes the court had jurisdiction over his offense: the battery on Bryant. He merely takes issue with the charge that should have been brought. In essence, he is making the argument that someone who has committed murder, for example, should be charged with murder and not with robbery. However, it is the prosecutor’s discretion to bring the charges and it is his burden to prove the elements of

that offense. That the prosecutor may have brought a charge against a defendant that he cannot prove has no bearing on whether the trial court has jurisdiction to hear the case. (See *People v. Adams* (1974) 43 Cal.App.3d 697, 708.) Thus, Santos’s jurisdictional argument is a red herring that we disregard.² The real issue is whether the prosecution proved that Santos committed a battery on a school employee as described by section 243.6, which leads us to Santos’s second issue.

II. Sufficiency of the Evidence

Santos argues his conviction was not supported by sufficient evidence “because the prosecution did not prove that the dispute arose outside of the context of an otherwise lawful labor dispute, and all evidence at trial suggested that it did.” We disagree. The prosecution sufficiently proved each element of the crime that it was required to prove.

Santos’s entire argument is based on an incorrect premise—that the labor dispute exception is an element of the crime. Rather, it is a defense to the offense; the burden is on the defendant, not the prosecution. “ ‘It is well established that where a statute first defines an offense in unconditional terms and then specifies an exception to its operation, the exception is an affirmative defense to be raised and proved by the defendant. [Citations.]’ ” (*People v. George* (1994) 30 Cal.App.4th 262, 275.)

² Santos’s reliance on *Banales v. Municipal Court* (1982) 132 Cal.App.3d 67 to support his jurisdictional argument is misplaced. There, a group of striking workers trespassed to communicate with the strike breaking farm workers. The issue was “the jurisdiction of a state court over conduct which is arguably protected by the Agricultural Labor Relations Act (hereafter ALRA).” (*Id.* at p. 70.) Because it was well established in California that peaceful labor activity, including trespass on to private property, was conduct protected by the ALRA, the National Labor Relations Board preempted the trial court’s jurisdiction over the defendants’ criminal prosecution. (*Banales*, at p. 73.) This case does not involve conduct protected by the labor statutes, much less “peaceful labor activity,” and Santos does not argue otherwise. To the extent Santos suggests this matter has been preempted by the National Labor Relations Board, he has failed to provide any legal support for that proposition.

In *People v. George*, *supra*, 30 Cal.App.4th at page 275, the defendant was charged under a statute prohibiting inmates from possessing controlled substances unless authorized by the warden. The defendant argued that the prosecution had to prove the warden did not authorize his possession of methamphetamine while in custody. (*Ibid.*) The prosecution did not prove lack of authorization and the trial court did not instruct the jury that lack of authorization was an element of the crime. (*Id.* at pp. 276-277.) The Court of Appeal found no error, reasoning that where exceptions or provisos neither describe the offense nor define it, but rather afford a matter of excuse, “ ‘ “they are to be relied on in [the] defense.” [Citations.]’ [Citations.]” (*Id.* at p. 275.)

Similarly here, the existence of an otherwise lawful labor dispute does not define or describe the offense and therefore is not an element of the offense. Instead, it is an exception to the offense and must be raised as a defense by the accused. At trial, Santos did not request and the trial court did not instruct the jury on the labor dispute exception. Indeed, Santos’s defense theory appeared to be mutual combat. In his closing argument, Santos’s counsel told the jury, “The case is [about] whether . . . the prosecution has proven that Mr. Bryant did not accept the challenge to fight.” Santos’s counsel argued it is not unlawful to touch someone when a person agrees to fight because then, that person has agreed to be touched. Santos’s failure to assert the defense at trial waives his argument on appeal. (*People v. Vera* (1997) 15 Cal.4th 269, 275-276; *People v. Lam* (2004) 122 Cal.App.4th 1297, 1301; *People v. Ramirez* (2003) 109 Cal.App.4th 992, 997.)

In any event, we find substantial evidence supports the conclusion that the dispute did not arise from a lawful labor dispute. Santos testified that he felt the issue was “personal.” He further testified that his anger about his wife’s head injury stemmed from his son’s suicide, which he believed resulted from a head injury. On cross-examination, Santos agreed that he “believed that [Bryant’s] response to [Santos’s] raising the issue of [his] wife made him feel that [they] were . . . going beyond the bounds of what [they] had been talking about, and [Bryant’s] response to that made [Santos] then get angry”

III. Jury Instruction

Santos further argues the trial court committed reversible error by instructing the jury on mutual combat as a form of self-defense after defense counsel had told the jury that self-defense was not a theory of the case. Initially, the trial court instructed the jury on Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 949:

“The defendant is charged with battery against a school employee. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. Mark Bryant was a school employee; [¶] 2. The defendant willfully and unlawfully touched Mark Bryant in a harmful or offensive manner; [¶] 3. When the defendant acted, Mark Bryant was performing his duties as a school employee; [¶] 4. When the defendant acted, he knew, or reasonably should have known, that Mark Bryant was a school employee; [¶] AND [¶] 5. Mark Bryant suffered an injury as a result of the force used.”

The bench notes to instruction CALCRIM No. 949 direct the trial court to add the words “and unlawfully” in element two if there was sufficient evidence of self-defense or defense of another. If the words “and unlawfully” were included, the trial court is directed to sua sponte give the self-defense instructions. (Bench Note to CALCRIM No. 949 (2006 rev.) (2008 ed.) pp. 724-725.) Although the court initially intended to give the mutual combat self-defense instruction under CALCRIM No. 3471, defense counsel requested the court keep the words “and unlawfully” in CALCRIM No. 949, but not give CALCRIM No. 3471 because he did not argue self-defense.

During deliberations, however, the jury asked, “What constitutes unlawful touching? If Mr. Bryant accepted the challenge to fight, does that mean that Mr. Bryant was not unlawfully touched? And if Mr. Bryant accepted the challenge to fight, does that mean at that moment, he was not performing his duties as a school employee?” The trial court then had a long discussion with counsel regarding how to answer the jury’s questions. Defense counsel argued that the court should define mutual combat, but not give the mutual combat standard instruction under CALCRIM No. 3471. Defense counsel, however, failed to provide the court with a specially drafted instruction and did not cite any case law supporting his concept of mutual combat. Concluding that it would

either have to remove the words “and unlawfully” from the battery against a school employee instruction or give the standard mutual combat instruction as directed under the bench notes, the trial court chose the latter course and allowed counsel 10 minutes each for additional closing argument. The trial court further instructed the jury with CALCRIM Nos. 3470, 3471, and 3472. CALCRIM No. 3471 provides:

“A person who engages in mutual combat or who is the first one to use physical force has a right to self-defense only if: [¶] 1. He actually and in good faith tries to stop fighting; [¶] 2. He indicates, by word or by conduct, to his opponent, in a way that a reasonable person would understand, that he wants to stop fighting and that he has stopped fighting; [¶] AND [¶] 3. He gives his opponent a chance to stop fighting. [¶] If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight.”

Defense counsel argued that the self-defense instructions did not define mutual combat properly. Instead, counsel argued that the prosecution had “to prove that these men didn’t lawfully engage in an agreement to fight”

Relying on *United States v. Oliver* (6th Cir. 1985) 766 F.2d 252 and *People v. Sanchez* (1978) 83 Cal.App.3d Supp. 1, Santos contends his right to assistance of counsel was violated because the self-defense instructions affected the “very foundation of the defense . . . thereby rendering counsel and his argument totally ineffective.” He is mistaken. Defense counsel here chose to premise his entire defense on the idea that mutual combat renders a battery not “unlawful” because the combatants agreed to the battery. However, consent to fight, in the context of mutual combat, is not a defense to battery. (*People v. Samuels* (1967) 250 Cal.App.2d 501, 513; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Defenses, § 87, p. 426.) So, had the trial court acquiesced to giving the instruction sought by defense counsel, it would have been in error. The trial court is not obligated to give an erroneous instruction merely because that is what was argued at closing. Although defense counsel specifically stated the case was not about self-defense, his primary defense was asserting the fight emanated from mutual combat. As a result, the trial court properly instructed the jury on a mutual combat defense to battery on a school employee. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 370.)

The cases relied upon by Santos to support this contention are distinguishable and not binding. (*Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd.* (1997) 58 Cal.App.4th 200, 206; *Patten-Blinn Lumber Co. v. Francis* (1958) 166 Cal.App.2d 196, 203.) In *United States v. Oliver*, *supra*, 766 F.2d at page 254, the defendant was charged with knowingly depositing in the mail a threat to injure a person. The court instructed the jury, without objection, that the prosecution had to prove the threat *was delivered* by the postal service. Defense counsel argued in closing that since the letter was never delivered, the prosecution had not proved its case. Before the jury began its deliberations, the prosecutor advised the court that the defendant was charged with *depositing the letter* in the mail for delivery and the jury instruction was wrong. Over defense counsel's objection, the trial court corrected the instruction and gave each side the option to reargue their closing to the jury. (*Ibid.*) On appeal, the court reversed and remanded for a new trial, finding the defense was faced with the impossible task of rearguing points he had conceded in his prior closing. "[T]he discovery of the error was so untimely that a curative instruction would not have rendered it harmless." (*Ibid.*)

In *People v. Sanchez*, *supra*, 83 Cal.App.3d Supp. 1, the trial court changed its mind about whether lack of consent was an element of the crime in the middle of defense counsel's closing argument. Since counsel had already argued lack of consent based on the jury instructions that were given, the appellate division of the superior court found the trial court's action "had the effect of destroying the credibility of the defense attorney in the eyes of the jury. Such required shifting of gears rendered defense counsel ineffective." (*Id.* at p. 7.)

In both of those cases, the trial court's belated correction of a jury instruction prejudiced the defendant and rendered defense counsel's arguments ineffective. Here, there was no mistake made by the trial court; instead it properly responded to a jury question. Given these circumstances, the court had a duty to instruct the jury on the correct application of Santos' mutual combat defense.

IV. Motion for New Trial

The media attention brought by the jury's verdict caused two people to come forward, who defense counsel claimed would have testified to having been assaulted by Bryant. One witness stated in his affidavit that he yelled at the volleyball coach for not utilizing her players properly. Bryant came to investigate the incident and "he bumped/pushed [the affiant] with his chest/stomach area physically forcing me out of the gymnasium." Another witness stated he and his wife were involved in a heated exchange with the basketball coach because their son did not get to play in the game. Bryant "aggressively" pushed him and told him to leave. Santos moved for a new trial on the basis of these affidavits, contending they were newly discovered evidence which related directly to Bryant's credibility about who struck first. Santos's motion for new trial was denied. The court reasoned the new evidence would "probably not be admissible and probably would not have changed the outcome of the trial." We find no abuse of discretion. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1047.)

It is unlikely the outcome of the trial would have changed since the issue at trial was not who struck first. Santos did not argue at trial that Bryant initiated the fight and he merely struck Bryant in self-defense. Instead, Santos testified that he challenged Bryant to a fight, Bryant accepted and they engaged in mutual combat. Mutual combat of the type argued by Santos is not properly a defense to battery, as discussed above. As a result, those previous incidents would have been irrelevant to the proceedings.

V. Probation Condition

As a condition of his probation, Santos was ordered to "[n]ot use or possess any narcotics, dangerous or restricted drugs and stay out of places where users, buyers or sellers congregate. [¶] Do not associate with persons known by you to be narcotic users or sellers."³ Santos argues this condition is unconstitutionally vague and overbroad

³ The probation condition specified in the minute order differs slightly from the court's oral pronouncement of judgment, which controls the case. (*People v. Farrell* (2002) 28 Cal.4th 381, 384, fn. 2.)

because “there was no knowledge qualifier with respect to places where drug users or sellers congregate” and “the condition is missing the concept of illegality.” Because probation conditions such as this should be narrowly drawn, *People v. Garcia* (1993) 19 Cal.App.4th 97, 102, we modify the condition as follows: Do not use or possess any illegal narcotics, dangerous or restricted drugs and stay out of places known by you to be where users, buyers or sellers congregate. Do not associate with persons known by you to be users or sellers of illegal narcotics.

DISPOSITION

The cause is remanded to the trial court with directions to modify the narcotics probation condition to read: “Do not use or possess any illegal narcotics, dangerous or restricted drugs and stay out of places known by you to be where users, buyers or sellers congregate. Do not associate with persons known by you to be users or sellers of illegal narcotics.” In all other respects, the judgment is affirmed.

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BIGELOW, J.

We concur:

FLIER, Acting P. J.

O’NEILL, J.^{*}

^{*} Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.